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Administrative Law—Power of Attorney General Under Martin Act Extends to Investigation of Investment Company Which Published Questionable Book

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where this Court upheld and applied a "point system" adopted by the Bureau of Motor Vehicles to determine whether an operator was a "persistent violator" within the meaning of the statute for purposes of license suspension or revocation. The Superintendent, the Court concludes, is merely declaring "in advance that certain rates are so plainly reasonable 'in relation to the benefits provided' (§ 154, subd. 7) as to require no further detailed consideration by the Superintendent in the ordinary rate application."[55] The declaration of rates, does not, as the petitioners contend, shift the burden of proof with respect to reasonableness of rates from the Superintendent to the insurer, for, as the Court observes, "with or without the regulation, the insurer must establish by ordinary principles of administrative law that its filing should be approved. . . ."[56]

The Court finds little merit in the petitioner's further argument that Sections 154 and 204 represent an unconstitutional delegation of legislative power. "The standards laid down in these statutes, that the premium rates approved be not 'unreasonable in relation to the benefits provided,' are fully as specific and clear as other statutory standards which this court has upheld."[57] In *Mtr. of City Utica v. Water Control Bd.*,[58] this Court, after first recognizing that the Legislature, when conferring discretion upon administrative agency, must limit the discretion and provide standards to govern its exercise stated: "It is enough if the Legislature lays down 'an intelligible principle,' specifying the standards or guides in as detached a fashion as is reasonably practicable in the light of the complexities of the particular area to be regulated."[59]

Bd.

POWER OF ATTORNEY GENERAL UNDER MARTIN ACT EXTENDS TO INVESTIGATION OF INVESTMENT COMPANY WHICH PUBLISHED QUESTIONABLE BOOK

Article 23-A of the General Business Law, titled "Fraudulent Practices in Respect to Stocks, Bonds, and Other Securities," otherwise known as the Martin Act or Blue Sky Law, authorizes the Attorney General to conduct an investigation and examine persons and records, both generally and preliminary to an action,[60] whenever any such person engages in any practice, transaction, or course of business relating to investment advice, which is believed to be fraudulent and deemed a subject of inquiry to protect the public.

In *In re Attorney General*,[61] an ex parte order was issued requiring one Nicholas Darvas, author of a best-seller, "How I Made $2,000,000 in the Stock Market," the American Research Council, the publisher, and Bernard Mazel, president of the company, to produce papers and records concerning alleged

55. Old Republic Life Insurance Co. v. Wikler, supra note 51 at 531, 215 N.Y.S.2d at 485.
56. Ibid.
57. Old Republic Life Insurance Co. v. Wikler, supra note 51 at 532, 215 N.Y.S.2d at 486.
58. 5 N.Y.2d 164, 182 N.Y.S.2d 584 (1959).
59. Id. at 169, 182 N.Y.S.2d at 587.
60. N.Y. Gen. Bus. Law §§ 352, 354.
61. 10 N.Y.2d 108, 217 N.Y.S.2d 603 (1961).

fraudulent practices relating to the published book and the advertising promotion thereof. Only the corporation and its president were served subpoenas, and they moved to vacate and set aside the order. The trial court vacated the order, and the Appellate Division affirmed on the ground that the book was not investment advice, within the statute.[62] In a four to three decision, the Court of Appeals, reversing both courts, held that the Attorney General's powers enabled him to examine such records.

Respondents argued that they were not investment advisors under Section 359(eee) of the General Business Law,[63] and that Darvas' book was autobiographical and showed no fraudulent purpose or act. Indeed, they claimed it did not advise anyone to do anything. The dissenting judges agreed with respondents' contentions and emphasized that the corporation's only alleged transaction was the publishing of Darvas' book. This act in itself did not make respondent corporation an investment advisor which "for compensation advised the public directly or through writings as to the advisability of investing or buying or selling securities."[64] The dissent noted that a judgment for the Attorney General would give him power to suppress any publication which described stock dealings.

The facts, however, appear to support the conclusion of the majority that the corporation's activities, in publishing and advertising for sale an allegedly questionable book purportedly based on actual fact, fell within the statute. It cannot be overemphasized that any action contemplated by the Attorney General would have necessarily been directed at the corporate entity and not at Darvas. Further, the corporate petitioner was a stock corporation actually registered with the Securities and Exchange Commission as an investment advisor pursuant to the Federal Blue Sky Law.[65] The corporation, in fact, advertised that "the Darvas method will make more and more profits" for those who buy the book. In reality, as a result of the marketing of the book, Darvas' technique, a system of stop orders, was employed in flurries and virtually bumped prices lower and lower. Of greater significance is the added factor of secrecy, so essential and protective, in a Martin Act proceeding. For in complying with an order, which is not unreasonable on its face and based on *some* amount of evidence, the dealer, in the event no fraud is uncovered, sustains no substantial injuries.

The present case is akin to *People v. Goldsmith*,[66] where defendant wrote, published, and sold to subcribers a market letter, which attempted to forecast and predict future prices of securities and commodities. The Court found no difficulty there in classifying this letter as a practice relating to the purchase

62. 13 A.D.2d 75, 213 N.Y.S.2d 108 (1st Dep't 1961).
63. N.Y. Gen. Bus. Law § 359(eee). (Defining an investment advisor, who is now required to register in New York.)
64. Ibid.
65. 15 U.S.C. § 80(b)(2), (1958).
66. 193 Misc. 295, 86 N.Y.S.2d 12 (Sup. Ct. 1955).

or sale of securities, where the defendant earned his livelihood from subcription rates. Here, the publishing of the book by respondent corporation could not be deemed in reality a mere incident to its corporate business. After all, its registering with the Securities and Exchange Commission was an admission of the scope of its business activities.

The extent of the investigative powers of the Attorney General, as interpreted in a handful of decisions relating to the Martin Act, is relatively broad in view of the equities involved.[67] In determining whether sufficient facts are shown warranting an order to produce records, courts should not require the measure of proof necessary at a trial. How much evidence is essential the Court of Appeals does not intimate, but in light of the purpose of the Martin Act, *i.e.*, to protect the unwary public from possible fraudulent practices in the securities area, it would appear that very little proof will be required to warrant such an order.

E. J. S.

CONFLICT OF INTEREST STATUTES STRICTLY APPLIED TO ACTS OF PUBLIC OFFICIALS

The New York Legislature has expressed in various statutes the general intent that a local governmental official shall not be interested, directly or indirectly, in any contract to which the governmental unit is a party.[68] It has specifically provided that a village official shall not "act as such in any matter or proceeding involving the acquisition of real property then owned by him for a public improvement."[69] In *Baker v. Marley*,[70] the mayor participated in meetings of the Board of Trustees which adopted resolutions leading to the condemnation of various parcels of real estate, one of which was owned by the mayor. The extent of the mayor's interest in the total property condemned for a municipal parking lot amounted to less than 1%, and he agreed to donate the $253 proceeds to the village. The mayor's interest in the property was wholly coincidental and his vote was not necessary for the adoption of the resolutions.

In an action to have the resolutions declared void, the complaint was dismissed at Special Term. This action was affirmed in the Appellate Division.[71] The Court of Appeals, one judge dissenting, reversed and held the resolutions void. The Court found that the resolutions and actions of the Board in connection with the acquisition of the property were "matters or proceedings" which involved the mayor in conflicts of interest which the Legislature had intended to prevent. Thus the resolutions were unlawful,[72] in which case

67. See People v. Federated Radio Corp., 244 N.Y. 33, 154 N.E. 655 (1926). (Where the meaning of fraud within the statute was interpreted to include both intentional and equitable or implied fraud.)

68. E.g., N.Y. Gen. City Law § 3; N.Y. Second Class Cities Law § 19; N.Y. Village Law § 332.

69. N.Y. Village Law § 332.

70. 8 N.Y.2d 365, 208 N.Y.S.2d 449 (1960).

71. 9 A.D.2d 894, 195 N.Y.S.2d 599 (4th Dep't 1960).

72. Cf. Clarke v. Town of Russia, 283 N.Y. 272, 28 N.E.2d 833 (1940).